71-1539

MAY 25 1972

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1971

No.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

against

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; MANUFACTURERS HANOVER TRUST COMPANY, as Mortgage Trustee; and PENN CENTRAL TRANSPORTATION COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 23, 1972.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The decision of the United States Court of Appeals for the Second Circuit (the "Court of Appeals") was issued

on March 17, 1972. The decision has not yet been officially reported. On April 28, 1972, Richard Joyce Smith, Trustee of the property of the New York, New Haven and Hartford Railroad Company (the "New Haven Trustee")* filed his petition for writ of certiorari with Appendix, seeking review of the Court of Appeals' decision (No. 71-1401). The decision of the Court of Appeals appears at pages A-5-A-24 of the Appendix attached to the New Haven Trustee's petition. In the interest of preserving the assets of the New Haven estate and avoiding duplication, no appendix has been attached to this Petition and references are made to the Appendix filed by the New Haven Trustee.

The Court of Appeals' decision reversed the decision of the New Haven Reorganization Court. That Court's decision is reported as *In re New York, New Haven & Hartford Railroad Co.*, 330 F. Supp. 131 (D. Conn. 1971) and reprinted at pages A-25-A-60 of the Appendix. The New Haven Reorganization Court's order of remand is reported as *In re New York, New Haven & Hartford Railroad Co.*, 331 F. Supp. 212 (D. Conn. 1971) and reprinted at pages A-61-A-65 of the Appendix.

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* Other frequently used contracted forms of reference herein are:

The New York, New Haven and Hartford Railroad Company, Debtor, is referred to as "New Haven".

Petitioner, The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee, is referred to as "Bondholders Committee".

The Penn Central Transportation Company, Debtor, is referred to as "Penn Central".

The United States District Court for the District of Connecticut is referred to as "New Haven Reorganization Court".

The United States District Court for the Eastern District of Pennsylvania is referred to as "Penn Central Reorganization Court".

The Interstate Commerce Commission is referred to as "Commission".

Jurisdiction

The Court of Appeals' decision is dated March 17, 1972. No mandate has been entered because, on April 6, 1972, the Court of Appeals granted the New Haven Trustee a thirty-day stay to permit his filing of a petition for a writ of certiorari prior to the issuance of a mandate.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where the New Haven Reorganization Court had, in the public interest, ordered the transfer of the New Haven assets to Penn Central prior to its passing upon the fairness and equity of the terms of inclusion propounded by the Commission and reserved jurisdiction to determine the fairness and equity of the terms, and thereafter rejected the terms and fixed new terms which were in turn in part rejected and in part affirmed by this Court, did the filing by Penn Central of a petition for reorganization before this Court's decision oust the New Haven Reorganization Court of its reserved jurisdiction to complete the transaction and preserve the constitutionality of the orders previously issued?

2. Where Penn and Central had accepted as a condition to their merger the specific jurisdiction of the New Haven Reorganization Court to pass upon the fairness and equity of terms of inclusion for the New Haven, and where the New Haven Reorganization Court then directed the transfer of the New Haven assets subject to its later examination of the terms of inclusion, was the Court of Appeals correct in holding that, where Penn Central thus acquired possession of the New Haven's property, Penn Central's filing of a petition for reorganization under §77 of the

Bankruptcy Act voided Penn Central's submission to the New Haven Reorganization Court and ousted the court of jurisdiction to determine the fairness and equity of the inclusion terms?

3. Where this Court in *New Haven Inclusion Cases, supra,* rejected as unrealistic an underwriting provision which, though designed to assure payment to the New Haven of the value of the assets it had already transferred to Penn Central, provided merely an unsecured promise to pay, and remanded to the New Haven Reorganization Court for further proceeding in accordance with its opinion, did the New Haven Reorganization Court's determination that an equitable lien and constructive trust in favor of the New Haven applied to those assets conform to the mandate of this Court and the requirements of fairness and equity?

Statutes Involved

The statutes involved in this case are: Section 77(a) of the Bankruptcy Act, 11 U.S.C. § 205(a), reprinted at pages A-1-A-3 of the New Haven Trustee's Appendix and Interstate Commerce Act §§ 5(2)(d) and 5(11), 49 U.S.C. §§ 5(2)(d) and 5(11).

Statement of the Case

The New Haven has been in reorganization under Section 77 of the Bankruptcy Act in the New Haven Reorganization Court since July 7, 1961. The Bondholders Committee has been authorized to represent holders of the New Haven's First and Refunding Mortgage Bonds since February 5, 1962. As of December 31, 1968, the claim of the holders of the First Mortgage Bonds totalled $101,659,900.00.

On March 9, 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company jointly filed their application with the Commission for authority to merge under Section 5 of the Interstate Commerce Act. The New Haven Trustees, on June 26, 1962, opposed the Penn Central merger unless the New Haven was included in the transaction under Section 5(2)(d) of the Interstate Commerce Act. On March 29, 1965, the Hearing Examiner's report in the Penn Central merger case was issued. It provided for operation by Penn Central of only the New Haven's freight service. Since the New Haven Trustees had presented no evidence on the question of fair and equitable terms, none were recommended. Only then, on March 31, 1965, did the New Haven Trustees reveal that they had previously negotiated and signed a secret agreement for the sale of the New Haven assets to Penn Central and the consideration to be received. The formal agreement was executed on April 21, 1966, but the New Haven Trustees never sought and never received authorization to sign the agreement. The Commission adopted the agreement. *Second Supplemental Report*, 331 I.C.C. 643 (1967) (Inclusion Report). The Bondholders Committee and other creditors objected and the New Haven Reorganization Court rejected the terms. *In re New York, New Haven & Hartford Railroad Co.*, 289 F. Supp. 451 (D. Conn. 1968).*

The Commission, with knowledge of the proposed agreement, simultaneously decided the *New Haven Passenger Discontinuance Case*, 327 I.C.C. 151 (1966) and the *Penn-Central Merger Approval Report*, 327 I.C.C. 475 (1966). The Commission denied discontinuance of the New Haven

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* The Court of Appeals incorrectly assumed that the New Haven Reorganization Court approved the Trustees' agreement as the basis for inclusion of the New Haven in Penn Central (A-6). The inchoate nature of the unauthorized and unapproved agreement was described by this Court in *New Haven Inclusion Cases*, 399 U.S. at 410 fn. 46.

passenger service, imposing on the New Haven the erosion of its estate in the public interest, on the basis of its merger decision which required Penn Central to "include" the New Haven as a merger condition.

The Commission fixed the following conditions:

> "8. The Pennsylvania New York Central Transportation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company—the inclusion of passenger operations being subject to the findings and determinations of the Commission as set forth in Finance Docket No. 23831 issued simultaneously with this report—upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (*and subject to approval by the Bankruptcy Court*) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose. * * * Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements." *Penn-Central Merger Approval Report,* 327 I.C.C. at 553 (emphasis added)
>
> . . . .
>
> "16. Consummation of the transaction approved herein shall constitute on the part of The Pennsylvania Railroad Company and the New York Central Railroad Company, their successors and assigns, acquiescence in and assent to the conditions stated in this appendix and in the attached report." *Penn-Central Merger Approval Report,* 327 I.C.C. at 555.

While the proceedings for the determination of fair and equitable terms for the New Haven's inclusion were pend-

ing before the Commission, the Bondholders Committee requested this Court to enjoin consummation of the Penn Central merger unless and until inclusion could be concurrently accomplished.

After the filing by the Bondholders Committee of its jurisdictional statement, but prior to argument before this Court, the Commission issued its *Inclusion Report*, 331 I.C.C. 643 (1967) and furnished copies to this Court. During the argument before this Court, Penn Central and the Commission urged that Penn Central be permitted to consummate the merger even though the terms of inclusion had not yet been subjected to review by the New Haven Reorganization Court because Condition 8 to the Penn Central merger and the Commission's retention of jurisdiction afforded the New Haven bondholders full protection for their claims and constitutional rights.* The Bondholders Committee argued that its full rights should not be left to future orders of the Commission but were forced to acknowledge that a delay in the consummation of the Penn Central merger might well cause a termination of New Haven railroad service. This Court rejected the injunction application on the ground that since Penn and Central by their merger submitted themselves absolutely to the reserved jurisdiction of the Commission, which, in turn, was required to provide fair and equitable terms for the bondholders, subject to the approval of the New Haven Reorganization Court, the bondholders could not be injured if the merger proceeded in advance of inclusion. Under these circumstances, this Court held that the public interest in continued railroad service should be protected. This Court said:

> "Continuation of the operations of the NH, which the Commission has found to be essential, can be assured only upon and after effectuation of the merger of

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* The undertaking of counsel for Penn Central to this Court during the oral argument is quoted in *In re New York, New Haven & Hartford Railroad Co.*, 289 F. Supp. 451, 460 (D. Conn. 1968).

> Penn-Central. The bondholders agree that to delay the Penn-Central merger until all proceedings necessary to include the NH have taken place may well mean the end of NH operations. The only realistic way to avoid this is to permit prompt consummation of the Penn-Central merger subject to appropriate conditions respecting the New Haven *which Penn-Central will perforce accept by its act of merger. . . .*
>
> While we reject the appeal of the NH bondholders, *acceptance or rejection of the terms and conditions on behalf of the NH remains to be determined. The bondholders' objections may be registered and adjudicated in the reorganization court* or upon judicial review as provided by law. Furthermore, as noted above, the Commission has retained jurisdiction to make further appropriate orders, if necessary, and has provided both that inclusion of NH in Penn-Central and the making of the loan arrangement on such terms as are prescribed by the Commission are conditions of approval of the merger." *Penn-Central Merger Cases,* 389 U.S. 486, 510-11 (1968) (emphasis added)

This Court's decision made it clear that the New Haven bondholders were thereafter precluded from seeking interim remedies which might result in the termination of New Haven operations, which were deemed essential in the public interest. This Court decided that the absolute submission of Penn Central to Condition 8 and the approval of the New Haven Reorganization Court would provide full protection for the New Haven bondholders' right to full payment for the assets transferred to Penn Central.*

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* Earlier, in April, 1967, the Bondholders Committee sought the termination of the reorganization proceedings to permit liquidation of the New Haven assets. The Supreme Court opinion permitting consummation of the merger was issued on January 15, 1968. Penn and Central merged on February 1, 1968. On February 13, 1968, the New Haven Reorganization Court dismissed the petition seeking termination of the reorganization proceedings on the ground that the bondholders would be fully protected. *In re New York, N.H. & H.R.R.,* 281 F. Supp. 65 (D. Conn. 1968).

Judicial review of the Inclusion Report and orders then proceeded in both a Statutory three-judge District Court for the Southern District of New York and the New Haven Reorganization Court. Both Courts found that the Commission had committed numerous errors and both remanded the proceedings to the Commission.*

In remanding the Inclusion Report to the Commission for the correction of its many errors, the New Haven Reorganization Court also held that the continuation of the New Haven's deficit railroad operations after December 31, 1968 would unconstitutionally deprive the New Haven bondholders of their property and declared that the public interest had been served to the full extent permitted by the Constitution. On the remand, the Bondholders Committee objected to a transfer of the New Haven assets free and clear of the first mortgage lien without absolute assurance of the payment of liquidation value which it contended was required by the Constitution. The Commission issued its *Fourth Supplemental Report,* 334 I.C.C. 25 (Remand Report) on November 25, 1968.** To the bondholders' objection to the transfer of assets without payment the Commission replied

> "We disagree with the position of those creditor interests which argue that the reorganization court cannot require the creditors to surrender their liens unless they are assured of receiving liquidation value . . . of the NH assets . . .

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* *New York, N.H. & H.R.R., First Mortgage 4% Bondholders Committee* v. *United States,* 289 F. Supp. 418 (S.D.N.Y. 1968); *In re New York, N.H. & H.R.R. Co.,* 289 F. Supp. 451 (D. Conn. 1968).

** The Commission increased the price by approximately $20 million to $145.6 million which the Bondholders Committee and other creditors contended was inadequate. The Bondholders Committee also contended that the consideration was overvalued.

> The NH creditors are *guaranteed just and reasonable compensation* and other terms for their interests in the NH, *whenever distribution of the compensation shall occur, whether at the time of or after the properties pass to Penn Central.* Since Penn Central must include the NH and must pay a price just and reasonable to all concerned, the creditors lose nothing, vis-a-vis Penn Central, by having their liens transferred from the NH properties to the consideration which Penn Central will eventually have to pay." (334 I.C.C. 74-75) (emphasis added)

Penn Central opposed the inclusion of the New Haven until the payment terms had been subjected to the final judicial review. The Commission rejected Penn Central's position, stating "the continuation of NH service without interruption is a public interest matter of paramount importance" (334 I.C.C. at 76). The Commission refused to delay inclusion "even in view of the high probability that litigation will continue beyond that date [January 1, 1969] over the price and other terms of the inclusion" (*Id.*). It considered that its orders "adequately preserve their [the parties] rights pending final adjudication of appeals taken or to be taken from our order under section 5 . . ." (*Id.*).

The Remand Report was forwarded to the New Haven Reorganization Court and the three-judge Statutory Court for review. The New Haven Reorganization Court held a hearing on December 20, 1968 for the sole purpose of reviewing the provision of the Commission's order which required a transfer of the New Haven assets by December 31, 1968 before the terms had been subjected to final review. By its Order No. 559 dated December 24, 1968, the New Haven Reorganization Court approved the provision, directed the conveyance of the New Haven assets, and reserved jurisdiction to consider and determine questions related to the terms of the transaction.

Judicial review of the Commission's Remand Report followed in the New Haven Reorganization Court and in the three-judge Statutory District Court. The decisions of the two Courts conflicted.*

On review of the Remand Report, the New Haven Reorganization Court found that the Commission still understated and improperly discounted liquidation value of the New Haven assets to the extent of approximately $30 million and that there was no adequate assurance that the New Haven would actually receive the full value of the property transferred. To insure full payment, the New Haven Reorganization Court imposed upon Penn Central a form of guarantee or "underwriting". *In re New York, New Haven and Hartford R.R. Co.*, 304 F. Supp. 793 (D. Conn. 1969). The "underwriting plan" was adopted by the three-judge Statutory District Court, *New York, N.H. & H.R.R. First Mortgage 4% Bondholders Committee* v. *United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969) and by the Commission. *Fifth Supplemental Report*, 334 I.C.C. 528 (1969). The Bondholders Committee and other creditors appealed to this Court. Among other grounds cited for appeal was the attribution of certain values to Penn Central shares and the inadequacy of the underwriting plan to assure payment of the constitutional minimum to which the bondholders were entitled.

The matters were then reviewed in expedited proceedings by this Court. *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

On June 21, 1970, while the matter was awaiting decision by this Court, Penn Central filed a petition under Section 77 of the Bankruptcy Act. On June 21, 1970 also, the Penn Central Reorganization Court issued its Order

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* *New York, N.H. & H.R.R. First Mortgage 4% Bondholders Committee* v. *United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969); *In re New York, New Haven and Hartford R.R. Co.*, 304 F. Supp. 793 (D. Conn. 1969).

No. 1 containing the usual blanket injunction against the continuation of proceedings. Nevertheless, on June 29, 1970, this Court issued its decision remanding the matter to the New Haven Reorganization Court for further proceedings in accordance with its opinion, while taking cognizance of the intervening Penn Central petition for reorganization. *New Haven Inclusion Cases, supra,* at 399, fn.

This Court held:

> "The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of December 31, 1966. That price hypothesizes a shutdown of New Haven followed by a sellout of its assets at their highest and best value. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue of their mortgage liens. . . ." (399 U.S. at 489-90)
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> . . . .
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> "There is no longer room for dispute that the bondholders will receive the highest and best price for the assets of the debtor as of December 31, 1966." (399 U.S. at 492)
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> . . . .
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> "On the other hand, we must also reject any lingering suggestion by Penn Central that the price it must pay for the New Haven assets is unfair in either a statutory or a constitutional sense." (399 U.S. at 493)

Having found that the New Haven bondholders must receive the "highest and best price for the assets of the debtor as of December 31, 1966" and having confirmed the New Haven Reorganization Court's determination that the value of those assets was $174,635,899, this Court rejected the New Haven Reorganization Court's "underwriting plan" as "wholly unrealistic" because it did not assure that the New Haven bondholders would finally receive that amount under the underwriting plan in view of Penn Central's petition for reorganization. This Court declared in plain language:

> "The fairness and equity that are the essence of a § 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." (399 U.S. at 488).

It remanded the matter to the New Haven Reorganization Court for further proceedings in accordance with its opinion, thereby requiring the New Haven Reorganization Court and the Commission to formulate terms that would make impossible the "payment for the transferred New Haven properties that may be worth only a fraction of its purported value."

After receiving the mandate from this Court, the New Haven Reorganization Court directed that statements of position be filed by the New Haven Trustee and other interested parties with respect to specified issues to be included in an order of remand to the Commission. The Penn Central Trustees then procured an order from the Penn Central Reorganization Court directing them to appear specially and object to the remand proceeding being conducted by the New Haven Reorganization Court. They then appeared specially in the proceedings but nevertheless proceeded to brief and argue the issues on the merits.

The New Haven Reorganization Court entered its Memorandum of Decision on June 11, 1971 (A-26-A-60) and its order on June 22, 1971 (A-61-A-65), holding that it had jurisdiction to adjudicate the issues before it and declaring the existence of an equitable lien upon the former New Haven assets and a constructive trust upon the excess income from the Grand Central Terminal Properties.* The New Haven Reorganization Court stated:

> "This court has the exclusive jurisdiction to determine the effect of the Supreme Court's mandate in the *New Haven Inclusion Cases*, and this court must decide what is to be done to implement it. The full price required to be paid for the New Haven's assets was decided, but the terms of payment were not; and this court alone must review and determine what means, pursuant to the Supreme Court's mandate, are proper. The I.C.C. cannot adjudicate the issues of law now before this court, for these lie outside its jurisdiction. . . .
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> "So here, the Commission has no jurisdiction to decide the legal questions of the New Haven's status, whether as that of a stockholder or creditor, including the type of creditor, and the further related question as to whether or not the New Haven estate has a full security interest in its former properties for the balance of the purchase price. These are legal questions which are for this court in construing the Supreme Court's mandate. In the circumstances of this case ordinary sense and logic call for a resolution of these paramount issues before remand of the case to the I.C.C. in order that it may proceed with prior knowledge of how the legal questions have been adjudicated." 330 F. Supp. at 136-137 (A-28-A-29).

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* See *New Haven Inclusion Cases, supra*, at 445-451.

The Penn Central Trustees, Manufacturers Hanover Trust Company, as trustee under the New York Central and Hudson River Railroad Co. Gold Bond Mortgage (a creditor of Penn Central), and Penn Central Transportation Company appealed to the Court of Appeals for the Second Circuit. The Commission participated in the proceedings before the New Haven Reorganization Court and submitted a statement of position, but did not appeal.

The Court of Appeals reversed on the ground that the New Haven Reorganization Court "lacked subject matter jurisdiction under § 77(a) of the Bankruptcy Act, 11 U.S.C. § 205(a) (1970), to issue the order, since the property affected is within the exclusive jurisdiction of another district court" (A-5) and directly remanded the case to the Commission.

The Court of Appeals explicitly held that the New Haven Reorganization Court's jurisdiction to implement the mandate of this Court, its reserved jurisdiction under the order authorizing the transfer of the New Haven assets in advance of the final determination of terms of inclusion, and its *in personam* jurisdiction over the Penn Central Trustees, must all fall to the literal "exclusive jurisdiction" language of § 77(a), supported by the majority's interpretation* of *Warren* v. *Palmer* 310 U.S. 132 (1940). In addition, since the majority appears to oust the New Haven Reorganization Court from having any future voice in connection with the determination of the fairness and equity of the still open terms of inclusion (A-16, A-18), the Court of Appeals has held without comment that Conditions 8 and 16 to the Penn Central merger, designating the New Haven Reorganization Court as the court having jurisdiction over approval of the terms of inclusion under Section 5(2)(d) of the Interstate Commerce Act, must be

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* Judge Mansfield concurred in the remand to the Commission but dissented from the majority's interpretation of *Warren* v. *Palmer*, *supra* (A-22).

deemed abrogated, thereby dismissing the emphasis this Court placed upon Conditions 8 and 16 in *Penn Central Merger Cases, supra,* and *New Haven Inclusion Cases, supra.** There is no authority, and the Court of Appeals cited none, for the proposition that conditions imposed under Section 5(2)(d) of the Interstate Commerce Act are rendered inapplicable by the filing of a petition for reorganization.

The Court of Appeals concluded:

> "We do not imply by this remand that we disagree either with the fairness of Judge Anderson's order or with his conclusion that the Supreme Court's opinion in *New Haven Inclusion Cases* requires that the New Haven estate receive $174.6 million as compensation for the taking of its property. We hold only that the Connecticut reorganization court is not the proper body to grant whatever protection is required because it has no jurisdiction, and we remand the case to the Interstate Commerce Commission with directions to consider, in light of the Penn Central reorganization, the form of consideration the New Haven estate should receive." (A-19)

Reasons for Granting the Writ

Summary

On December 31, 1968, the New Haven assets were transferred "free and clear" of the liens of the First Mortgage Bondholders in advance of final determination of the terms of inclusion and delivery of the full compensation

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* The harshness of the "ouster" of the New Haven Reorganization Court is emphasized by the fact that the Bondholders Committee has been held to have no standing in the Penn Central reorganization proceedings. *In the Matter of Penn Central Transportation Company,* 455 F.2d 811 (3rd Cir. 1972). A petition for a writ of certiorari has been filed with this Court (No. 71-1384).

to which the bondholders' lien could then attach. This extraordinary procedure was imposed because the public interest was said to require uninterrupted New Haven railroad service. The removal of the bondholders' property without immediate just compensation was stated to be consistent with the Constitution because the bondholders' constitutional rights were completely protected by the retained jurisdiction of the Commission and the New Haven Reorganization Court. The Commission had previously "guaranteed just and reasonable compensation" to the bondholders and considered that its reserved jurisdiction and that of the New Haven Reorganization Court fully preserved the bondholders' rights "pending final adjudication of appeals taken or to be taken from our order under section 5". *Remand Report,* 334 I.C.C. at 74-76. In ordering the transfer of the assets, the New Haven Reorganization Court reserved jurisdiction over "the fairness and adequacy of the consideration and the other terms of inclusion" (Order No. 559 dated December 24, 1968). Among the "terms of inclusion" fixed by the New Haven Reorganization Court was an "underwriting plan" devised by the New Haven Reorganization Court to assure that the New Haven bondholders received the full compensation due to them. Upon appeals to this Court, the terms of inclusion and purchase price were approved, but this Court, in light of Penn Central's petition for reorganization, found the "underwriting plan" to be "wholly unrealistic" and ordered "a reassessment of the consideration"* so that the bondholders would actually receive the full compensation due to them. See *New Haven Inclusion Cases, supra,* at 489-90, 492.

The Court of Appeals' holding ousts the New Haven Reorganization Court from its jurisdiction to take the steps necessary to preserve the constitutionality of the

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* The bulk of the consideration was then contemplated to consist of securities of Penn Central of questionable value.

extraordinary orders it has already issued in an extreme effort to serve the public interest. This Court's decision in *Penn Central Merger Cases, supra,* foreshadowed the transfer of the assets out from under the bondholders' liens in the public interest. Only this Court can interpret its mandate in *New Haven Inclusion Cases, supra,* to preserve the jurisdiction necessary to assure protection of the constitutional rights of the bondholders.

The Court of Appeals erred in ousting the New Haven Reorganization Court of jurisdiction upsetting completely the procedure previously established by this Court and the Commission.* The error seriously endangers the constitutional rights of the bondholders and even their right to be heard in defense of their own interests. Important questions involving constitutional law, Section 77 of the Bankruptcy Act, Section 5 of the Interstate Commerce Act and the construction of this Court's mandate are presented.

1. The Court of Appeals erred in concluding that the New Haven Reorganization Court was ousted from its jurisdiction to take additional steps necessary to preserve the constitutionality of orders previously issued.

From the beginning of these proceedings it was recognized that the merger of Penn and Central, the terms for the inclusion of the New Haven, and even the New Haven's reorganization, would have to proceed step by step. It was recognized that, while ordinarily it is preferable for the merger conditions to spell out precisely all of the obligations to be assumed by the merger partners, this could not be accomplished expeditiously in the instant proceedings. *Penn-Central Merger Cases, supra.* Even the New Haven Reorganization was divided into a unique "two-step" plan** and finally, even the "first step" of the

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* Even the Penn Central Trustees had not presumed to ask the Court of Appeals for such relief. In consequence, the question was never briefed or argued to the Court of Appeals.

** See *New Haven Inclusion Cases, supra,* at 413-14 fn. 47; *In re New York, N.H. & H.R. Co.,* 378 F. 2d 635 (2d Cir. 1967).

New Haven reorganization plan was subdivided so that the public interest could be served.

Thus, Penn and Central were authorized by the Commission to merge in advance of the formulation of inclusion terms. *Penn-Central Merger Approval Case,* 327 I.C.C. 475 (1966). Thereafter, the Commission and the New Haven Reorganization Court deemed it necessary to require the New Haven to transfer its property in advance of an adjudication of the amount Penn Central would have to pay for the New Haven assets and the terms of payment. When Penn Central desired to merge, it stated its complete willingness to risk whatever future terms were finally imposed *subject to the approval of the New Haven Reorganization Court.* See *In re New York, N.H. & H.R. Co.,* 289 F. Supp. 451, 460 (D. Conn. 1968).

In ordering the transfer of the New Haven property to Penn Central in advance of satisfying itself that it could approve the Commission's terms of inclusion, the New Haven Reorganization Court recognized that it was disposing of the property of creditors over their objections to the terms of inclusion and in advance of their vote on a plan of reorganization. The New Haven Reorganization Court insulated this extraordinary step against the charge of impropriety by a broad reservation of jurisdiction. This broad reservation was required because the court found that the public interest required that continued rail service be furnished while the constitutional rights of the bondholders forbade the New Haven from continuing to furnish it. The rights of the bondholders could not be determined or satisfied before railroad service would terminate. To protect against the possibility that the bondholders would be unfairly or unconstitutionally treated, broad jurisdiction was reserved and a transfer of the New Haven operations to Penn Central was imposed.

The New Haven Reorganization Court then determined the inclusion terms, both as to the amount and as to Penn

Central's unsecured promise to assume payment of that amount (the "underwriting plan"). The decision of this Court in *New Haven Inclusion Cases, supra,* confirmed the jurisdiction of the New Haven Reorganization Court to fix terms of inclusion in the posture of this case, but held those fixed inadequate for failing to assure that the bondholders would finally receive the value of the property taken from them. This Court stated:

> ". . . we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum [liquidation value]." (399 U.S. at 489)
>
> . . .
>
> "The fairness and equity that are the essence of a § 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." (399 U.S. at 488)

When this Court's mandate was issued to the New Haven Reorganization Court, the duty devolved upon that court to define the law of the case in respect of inclusion terms to the Commission, so that the Commission's further proceedings on remand would not require the determination of questions of law. Even more importantly, the remand required the correction of the defect this Court had found in the underwriting plan created by the New Haven Reorganization Court. The order reversed by the Court of Appeals provides one formula for the correction, by the Court that made it, of the error adjudged by this Court.*

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* Future events may yet demonstrate that even the security interest declared in the order reversed by the Court of Appeals is inadequate to protect the constitutional rights of the bondholders and their rights under § 77, just as the underwriting plan proved inadequate in the light of future events. The Bondholders Committee does not intend by its support of the order of the New Haven Reorganization Court to waive its right to appropriate inclusion terms should future events prove further protection is required.

The Court of Appeals brushed aside all the history of this case and all the careful and important reservations of jurisdiction, in favor of a literal reading of the "exclusive jurisdiction" phrase of § 77(a) and an expansive interpretation of the case of *Warren* v. *Palmer, supra.*

As to the reservation of jurisdiction contained in the order of the New Haven Reorganization Court, the Court of Appeals simply concluded that "the subsequent approval of Penn Central's petition by the Pennsylvania reorganization court served to oust the Connecticut court's jurisdiction and to vest 'exclusive jurisdiction' in the Pennsylvania court" (A-18). There is no authority for the holding of the Court of Appeals and none was cited by the Court of Appeals. The only attempt at justification for the holding is contained in the completely unsupported statement that ". . . the effect of the exercise of retained jurisdiction would be to hinder the ability of the reorganization court to administer the property of the railroad pending reorganization" (A-18). A declaration of legal rights, if correct, does not "hinder the ability of the reorganization court to administer the property". A reorganization court should not be deemed to be above the law with respect to property in the possession of the debtor's trustees. That court should be subservient to, and need only follow, the law that has been established and administer the estate within the framework of the applicable law.

The Court of Appeals held that this Court's decision in *Warren* v. *Palmer, supra,* "is determinative of this case" (A-13). But that case bears no resemblance to the instant situation, where Penn Central came into possession of the New Haven assets because of a compelled transfer in the public interest. That transfer in the first instance was justifiable only because jurisdiction had been reserved to fix appropriate terms. The decision of the Court of Appeals that the New Haven Reorganization Court has been ousted of jurisdiction to preserve the constitutionality

of its earlier orders should be reviewed by this Court and rejected.

The Court of Appeals' ouster of the New Haven Reorganization Court, if upheld, would have the effect of depriving that Court of passing upon the propriety of the first step of the plan of reorganization for the New Haven in violation of the statutory scheme of § 77 of the Bankruptcy Act. It would require this Court to pass upon the propriety of the first step of a New Haven plan of reorganization without the benefit of the opinion of the New Haven Reorganization Court. It would deprive the creditors of the New Haven of the right to be heard in the forum in which their standing is assured. It would assign the determination of the propriety of the first step of the New Haven plan of reorganization to a reorganization court which is not familiar with the New Haven history, which has for its primary function the protection of the public interest in a reorganization of Penn Central and which has already questioned the standing of the New Haven creditors to be heard before it. These questions are of such far reaching magnitude and require such novel interpretations concerning the statutory scheme in reorganization proceedings that this Court should grant review.

2. The Court of Appeals erred in disregarding Penn Central's obligations under Section 5 of the Interstate Commerce Act and Condition 8 to the Penn Central merger.

In *New Haven Inclusion Cases, supra,* this Court described its earlier role as follows:

> "On January 15, 1968, this Court had upheld the validity of the Penn Central merger under § 5 of the Interstate Commerce Act, conditioned on the inclusion of New Haven on terms subject to objections to be '*registered and adjudicated in the bankruptcy court* or upon judicial review as provided by law.' *Penn Central Merger Cases,* 389 U.S. at 511. We had permitted a postponement of the inclusion of New Haven

on the basis of Penn Central's acceptance of the inclusion requirement, id., at 509, and because by its act of merger Penn Central would 'perforce accept . . . appropriate conditions respecting the New Haven. . . .'' *Id.*, at 510.

"Two weeks later Penn Central merged. At that point the lack of jurisdictional 'completeness' in the reorganization court, to which we have earlier referred, was cured, for there now remained no question of Penn Central's obligation to take over the assets of the New Haven. With Penn Central having given its irrevocable consent to the inclusion of New Haven by its act of merger, it was evident that *whatever terms the reorganization court might confirm, subject to review or appeal to the Court of Appeals followed by certiorari here, would bind Penn Central by virtue of its merger commitment.*" (399 U.S. at 427-28) (emphasis added).

In spite of the determination by this Court that by its merger subject to Condition 8, Penn Central had given its irrevocable consent to "whatever terms the reorganization court might confirm", the Court of Appeals has now determined that the jurisdictional aspects of Condition 8 have been terminated by the filing of a petition for reorganization by Penn Central. The Court of Appeals cited no case or statutory authority for the proposition that the filing of a petition under § 77 is sufficient to free Penn Central of merger conditions fixed in combined § 5 and § 77 proceedings. Indeed, the Court of Appeals managed to write its opinion without any discussion of Condition 8.

Pursuant to the jurisdiction mandated by Condition 8 and § 77, the New Haven Reorganization Court fixed an "underwriting plan" designed to assure payment to the New Haven. In the light of Penn Central's reorganization proceedings, this Court struck down the underwriting plan because the general creditor status provided by that

plan "may be worth only a fraction of its purported value" and would not satisfy the requirements of § 77 (399 U.S. at 488). On remand, the New Haven Reorganization Court fixed a term of inclusion which provides that the New Haven is a secured rather than a general creditor of Penn Central. There is no doubt that the declaration of such a term of inclusion was within the jurisdiction of the New Haven Reorganization Court and the Commission prior to the filing of Penn Central's petition for reorganization.* But because this Court recognized the underwriting plan to be unrealistic the Court of Appeals has now permitted Penn Central to avoid the entire statutory scheme of § 5 of the Interstate Commerce Act and § 77 and its obligations under Condition 8. The Court of Appeals has deprived the New Haven Reorganization Court of the opportunity to discharge its obligations to the New Haven bondholders arising from the transfer of the New Haven's property free of the bondholders' liens to Penn Central in advance of final terms, all on the theory that Penn Central's petition for reorganization insulated the Penn Central estate from all further proceedings in any court but that on which Penn Central by its petition claims to have conferred jurisdiction.

The postponement of the inclusion of the New Haven in Penn Central and the postponement of the fixing of final terms of inclusion was permitted by this Court and by the New Haven Reorganization Court only because it was recognized that the consummation of the merger constituted such a binding submission to the jurisdiction of the Commission and the New Haven Reorganization Court that there was no danger that terms of inclusion fair and equitable to the New Haven approved by the New Haven

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* The Penn Central Trustees recognized that it was within the Commission's jurisdiction to make such a declaration on remand. They argued only that it was premature for the New Haven Reorganization Court to declare that such a term was mandated by considerations of fairness and equity and this Court's decision.

Reorganization Court would not finally be carried out. When the Commission granted Penn and Central the right to merge, it automatically granted to them the benefits of § 5(11) of the Interstate Commerce Act which relieved them of all "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . ." This broad immunity may be conferred by the Commission only because it imposes conditions which assure continued control over the immunized merger partners. The decision of the Court of Appeals, ruling Penn Central free to abrogate Condition 8 while retaining the benefits of the merger, should be reviewed by this Court.

CONCLUSION

For the reasons above stated, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 71-1539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor*

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *Petitioner,*

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; MANUFACTURERS HANOVER TRUST COMPANY, as Mortgage Trustee; and PENN CENTRAL TRANSPORTATION COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM FOR GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION

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Petitioner herein seeks review of the same decision by the Court of Appeals for the Second Circuit as is sought to be reviewed in Nos. 71-1401 and 71-1451—petitions for certiorari filed, respectively, by the Trustee of the New York, New Haven & Hartford

Railroad Company, Debtor, and by the Successor Trustee under the Debtor's First & Refunding 4% Mortgage Bonds. The Court is respectfully referred to the Brief in Opposition filed by these respondents in those cases for the reasons why this petition, as well, should be denied.

Respectfully submitted,

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